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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-13

GARRELL S. MULLANEY, ET AL.
Petitioners

v.

STILLMAN E. WILBUR, JR.
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (see Appendix to Petition for Certiorari, pages A-1 through A-17) is reported at 496 F.2d 1303.

JURISDICTION

The latest judgment of the Court of Appeals was entered on April 30, 1974 (App. 130). On May 7, 1974, the Court of Appeals, pursuant to your Petitioners' motion for recall of

mandate, recalled and constructively reissued its mandate for the limited purpose of permitting the District Court to amend its order with respect to the time of retrial of the defendant, and to consider the question of bail. (App. 131). On May 10, 1974, the District Court stayed its original order pending final disposition of this case by the United States Supreme Court (App. 6). The petition was filed July 25, 1974, and was granted October 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether it violates the Due Process Clause of the United States Constitution to charge a jury, in a case of felonious homicide, that if they find on the evidence produced, from whatever source, that the State has established beyond a reasonable doubt an intentional and unlawful killing perpetrated by the defendant, the law presumes that homicide to have been committed with malice aforethought and that the burden is upon the defendant to convince them, by a preponderance of all the evidence, that the reductive factor of heat of passion on sudden provocation is present so as to warrant punishment of the felonious homicide as voluntary manslaughter rather than murder.

STATUTORY PROVISIONS INVOLVED

Maine Revised Statutes, Title 17:

§ 2651. Definition (MURDER)

Whoever unlawfully kills a human being with malice aforethought either express or implied is guilty of murder and shall be punished by imprisonment for life.

§ 2551. Definition (MANSLAUGHTER)

Whoever unlawfully kills a human being in the heat of passion, on sudden provocation, without express or implied malice aforethought, * * *, shall be punished by a fine of not more than $1,000 or by imprisonment for not

more than 20 years, except that if there is a violation of Title 29, sections 1315 or 1316, no prosecution for manslaughter shall lie.

STATEMENT OF THE CASE

At the trial of the State's case against Wilbur, the State alleged that Wilbur had inflicted such severe injuries upon the deceased with his fists and a blunt instrument, that death resulted within a few minutes. Wilbur's theory of defense was that though he had struck the deceased, it was in the heat of passion suddenly provoked by an indecent homosexual overture, and that, therefore, he had not acted with malice aforethought, and was guilty of voluntary manslaughter, not murder. The jury convicted Wilbur of felonious homicide punishable as murder.

Wilbur (hereinafter Defendant) appealed this conviction to the Maine Supreme Judicial Court. Among other allegations, not here relevant, he alleged that the Presiding Justice at his trial erred when he charged the jury to the effect that if it was satisfied that the State had proven beyond a reasonable doubt an intentional and unlawful killing, malice aforethought was "presumed" and the defendant would be guilty of murder, rather than (voluntary) manslaughter, unless he established, by a fair preponderance of the evidence, that he had killed in the heat of passion upon sudden provocation. This claim presented a single issue:

> Whether in thus placing the burden on the defendant to show, even by a preponderance of the evidence, the absence of malice aforethought, the Court denied him due process of law under the Rule of *In re Winship*, 397 U.S. 358 (1970).

The Maine Court rejected any possible *Winship* violation on two grounds. First, it saw "no occasion to anticipate" that *Winship* would be applied retrospectively. *State v. Wilbur*, Me.

278 A.2d 139, 146 (1971). (App. 91).[1] Second, the Court explained that, unlike many other jurisdictions, the State of Maine recognized the concept of a single generic offense of felonious homicide within which various degrees were fixed for the purpose of establishing punishment differentiation; these degrees or categories were denominated by the labels of murder, (voluntary) manslaughter, and (involuntary) manslaughter. Therefore, the Court felt that there would be an unwarranted extension of *Winship* if it were made to apply to the Maine presumption of malice arising from proof beyond a reasonable doubt of an *intentional* and *unlawful* killing since after such proof, the issue is no longer *guilt* or *innocence* of the crime of *felonious homicide,* but rather, what the *punishment* for the *crime* will be. In arriving at this conclusion, the Maine Court gave a comprehensive history of the law of felonious homicide as it has existed in Maine for over one hundred twenty-five years. *State v. Wilbur,* Me., 278 A.2d 139, 144-146 (1971), (App. 85 - 91).

Defendant then petitioned the United States District Court for the District of Maine for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241, *et. seq.* (App. 96). Defendant claimed a violation of his constitutional rights on several grounds, only one of which was deemed to be of sufficient merit to be heard by the Court; this was his Fourteenth Amendment (due process) claim just discussed (App. 106).

In its opinion, *sub nomine Wilbur v. Robbins,*[2] 349 F. Supp. 149 (1972), the District Court rejected the theory of felonious homicide as constituting a viable part of the Maine law and proceeded to interpret the Maine criminal statutes relating to the definitions of murder and manslaughter on their face, without the aid of any State Court interpretation,

[1] *Winship* has been made retroactive by the case of *Ivan V. v. New York,* 407 U.S. 203, (1972).

[2] After the District Court Opinion but before the initial First Circuit Court Opinion, Warden Robbins was replaced by Warden Mullaney.

concluding that *Winship* was applicable and due process violated. *Wilbur v. Robbins*, 349 F. Supp. 149 152, 153 (1972). (App. 109). The State[3] seasonably appealed to the United States Court of Appeals for the First Circuit.

Prior to the decision of the First Circuit, the case of *State v. Rollins*, Me., 295 A. 2d 914 (1972) was decided. *Rollins* once again traced the history and theory of felonious homicide. as it had developed in Maine, and reaffirmed the principles announced in *State v. Wilbur*, Me., 278 A.2d 139 (1971). The *Wilbur* and *Rollins* decisions confronted the First Circuit with the following:

1. From the inception of Maine's statehood to the present the laws defining murder and manslaughter have been set forth in separate statutes.

2. However, in 1854 in the case of *State v. Conley*, 39 Me. 78, the Court, relying upon the common law and notwithstanding the statutes explicitly established as the law of Maine:

> "When a party is charged in an indictment with the crime of murder, the felony actually committed is the same, whether it has all the elements of murder in the first or second degree, or whether it is wanting in the criterion of murder and is therefore manslaughter only. The two lower degrees of felonious homicide are embraced in the higher offense." *Id.* at 88, 89.

Thus *Conley* made clear that there existed in Maine a single underlying criminal entity as at common law – *felonious homicide* – within which were fixed three degrees, two under the label of "murder" and a third lower degree denominated "manslaughter", for the purposes of advance punishment differentiations.[4]

[3] For ease of reference, the Petitioners will be referred to throughout this Brief as the State and the Respondent as the Defendant.

[4] Maine no longer has first and second degree murder. Thus the only degrees of *felonious homicide* which now exist are murder, voluntary manslaughter, and involuntary manslaughter.

3. The statutes in Maine have never been altered by the Legislature in any manner suggestive of an intention by the Legislature to repudiate the common law concepts as held by *Conley* to be statutorily codified as the law of Maine, *i.e.* that there is a single generic offense, *unlawful (felonious) homicide*, of which degrees, for penalty purposes, are designated by the names "murder" and "manslaughter".

4. Thus the rationale which has allowed the principle that the State has the ultimate burden to prove all essential elements of any crime to exist side-by-side with the idea that the defendant must bear the ultimate burden of proof to reduce "murder" to "manslaughter" is that "murder" and "manslaughter" do not delineate separate *crimes* but are designations of the *degrees*, for the purpose of establishing penalty consequences, of a single underlying crime -- *unlawful (felonious) homicide.*

The Court of Appeals affirmed the decision of the District Court on February 14, 1973. The Court of Appeals rejected the theory of *felonious homicide* as announced by the Maine Court and went back into Maine law to point out how the Maine Court was, at best, in error in interpreting its own law and, at worst, was attempting to formulate and rely upon a novel interpretation in order to escape the requirements of *Winship.* The Court then relied upon the wording on the face of Maine's statutes relating to murder and manslaughter and upon the casual language of certain cases existing in Maine's law to supply what it thought should be the proper interpretation of Maine's homicide law. *Wilbur v. Mullaney*, 473 F.2d 943 (1973). (App. 118).

On April 26, 1973, the State filed a petition for writ of certiorari with this Court praying that a writ of certiorari issue to review the judgement and opinion of the First Circuit of February 14, 1973. This petition was assigned to Supreme Court Docket No. 72-1462. (App. 12).

After the filing of the petition for writ of certiorari by the State, the Maine Supreme Judicial Court decided the case of

State v. Lafferty, Me., 309 A.2d 647 (1973). In substance, *Lafferty*, while noting certain exceptions, rejected the right of the First Circuit to be the final arbitor of the internal criminal law of the State of Maine; it went on to reaffirm the substative law of *felonious homicide* as announced in the earlier decisions.

As a result of the *Lafferty* decision the State, on September 26, 1973, filed a supplemental brief to their petition of certiorari which was then still pending before this Court. The supplemental brief explained the significance of the *Lafferty* decision as it related to the issue of federal/state relationships involved in the original petition. On January 14, 1974, this Court granted certiorari wherein it vacated the February 14, 1973, opinion of the First Circuit and remanded the case to the First Circuit for further consideration in light of the *Lafferty* decision. (App. 128).

In response to this Court's remand, the case was resubmitted to the First Circuit with the resultant decision, of April 30, 1974. *Wilbur v. Mullaney*, 496 F. 2d 1303 (see Appendix to Petition for Certiorari, pages A-1 through A-17).

In its decision on remand the First Circuit:

1. Accepted the position of the Maine court that there exists in Maine a single crime, to wit: *unlawful (felonious) homicide* as announced in several decisions of the Maine Court, culminating with *State v. Lafferty*, Me., 309 A.2d 647 (1973).

2. Found that *In re Winship*, 397 U.S. 358 (1970), and its holding that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged, commands that the Maine procedure of placing the burden on a defendant to mitigate, by a preponderance of the evidence, the *prima facie* case of *felonious homicide* punishable as "murder" (already proven beyond a reasonable doubt) to the *lower degree* of "(voluntary) manslaughter" violates due process of law.

3. Rejected the principle spelled out in *State v. Wilbur*, Me., 278 A.2d 139 (1971):

> "[W]e do not accept the view that] the defendant is required to do no more than generate the issue leaving the State, if it can, to negate the reductive factors by proof beyond a reasonable doubt. We are not persuaded to this view which tends to emasculate the presumption and defeat the very purpose for which sound public policy has raised it . . . [W]here under *stated conditions* the presumption of malice is raised, the burden of proof shifts to the defendant to reduce murder to manslaughter." (emphases supplied)

4. Concluded that the "burden of proof must be on the State throughout; not sometimes on the State and sometimes on the defendant."

SUMMARY OF ARGUMENT

The law of Maine recognizes the concept of a single generic offense of felonious homicide of which there are three degrees, designated as murder, voluntary manslaughter and involuntary manslaughter. These three degrees are punishment classifications for the crime of felonious homicide, and are not viewed as separate crimes in and of themselves. When an accused is proved beyond a reasonable doubt to have committed an intentional, or particularly brutal, and unlawful killing (*i.e.* not justified or excused), the question remaining for resolution by the factfinder is a determination of the appropriate penalty category within which to place the crime.

The policy of Maine law has been that intentional, or particularly brutal, and unlawful killings, once proved, will be punished most severely (*i.e.* as murder) unless the defendant can establish heat of passion on sudden provocation so as to reduce the punishment to voluntary manslaughter. However, there is nothing in heat of passion on sudden provocation which will change the criminal character of the defendant's conduct already proved, *i.e.* an intentional, or particularly brutal, and unlawful killing. The device by which the above procedure is accomplished is labeled a "presumption of malice". The "presumption of malice" is not a presumption of anything

factual nor does it presume anything which is necessary to be proved in order to establish guilt in the first instance.

Further, heat of passion on sudden provocation cannot be termed an affirmative defense because the establishment of it does not negate criminality, but reduces punishment.

This procedure does not violate due process of law because it does not strike at anything which has been ranked so fundamental in our law as to be ruled essential to our concept of basic justice. The case of *In re Winship*, 397 U.S. 358 (1970) does not control because the *Winship* rationale is directed to that stage of a trial where *guilt* is being determined. The First Circuit's mechanical application of the technical considerations of *Winship* to the instant case constitutes an unwarranted extension of the rationale of *Winship* into an area where sound state policy should control.

ARGUMENT

I.

IT DOES NOT VIOLATE DUE PROCESS OF LAW TO CHARGE THE JURY IN A PROSECUTION FOR FELONIOUS HOMICIDE PUNISHABLE AS MURDER THAT MALICE IS PRESUMED UPON THE ESTABLISHMENT OF AN INTENTIONAL AND UNLAWFUL KILLING BEYOND A REASONABLE DOUBT BECAUSE PURSUANT TO THE MAINE LAW OF FELONIOUS HOMICIDE THE ISSUE UPON WHICH THE PRESUMPTION OPERATES IS NOT CRIMINALITY, BUT PUNISHMENT.

A

IN MAINE THERE EXISTS A SINGLE GENERIC OFFENSE OF FELONIOUS HOMICIDE UPON WHICH THE "PRESUMPTION OF MALICE" RELATES TO PUNISHMENT RATHER THAN CRIMINALITY.

Underlying the development of the law of homicide at the common law is a conceptualization of a single generic offense of

felonious homicide within which degrees are recognized and established. See summary of the development of the law of homicide in *McGautha v. California*, 402 U.S. 183, 197-203 (1971); and 4 Blackstone, *Commentaries* *176-204. This conceptualization of a single generic offense has been reflected in the law of Maine since the early days of statehood. See *State v. Conley*, 39 Me. 78, 87, 88 (1854). Such was re-examined and affirmed in the appeal of this Defendant to the Maine Supreme Judicial Court in *State v. Wilbur*, Me., 278 A.2d 139, 144 (1971), (App. 85). and has been further amplified and explained in *State v. Rollins*, Me., 295 A.2d 914 (1972) and *State v. Lafferty*, Me., 309 A.2d 647 (1973). The application of the concept of a single generic offense is demonstrated by the following:

Under existing Maine law murder and manslaughter are not separate and distinct crimes but are instead separate punishment categories representing different degrees of seriousness for penalty purposes of the single generic offense of felonious homicide.[5]

The punishment category of murder encompasses those felonious homicides in which the defendant either causes the death of another having a specific subjective intention that the death result from his conduct or that the defendant causes the death of another by conduct which, when objectively evaluated, is characterized by a high death producing potential. Additionally, such felonious homicides are described as being with "malice aforethought", a term of art having no independent meaning or viability apart from expressing a public policy judgment that such felonious homicides have attributed

[5]The elements of the crime of felonious homicide are: (1) that the victim is dead; (2) that the defendant killed the victim; (3) that the killing of the victim was done voluntarily by the defendant--that is, that the physical act or acts which caused the death were the results of an exercise of the defendant's will, as opposed to reflex or non-volitional acts; and (4) that the killing of the victim was unlawful (because it was neither justifiable nor excusable).

to them the highest degree of blameworthiness for purposes of severity of punishment.

The punishment category of voluntary manslaughter, like the punishment category of murder, encompasses those felonious homicides committed either by the defendant having a specific subjective intention to have death result from his conduct, or by the high objective tendency of the defendant's conduct to produce death. However, the actual subjective intention to have death result, or the deliberate cruel conduct, is generated by heat of passion upon sudden, (adequate) provocation. The presence of heat of passion on sudden, (adequate) provocation is as a matter of public policy, a palliating feature which attributes to such felonious homicides a lesser degree of blameworthiness for purposes of severity of punishment. Consequently, felonious homicides which contain this palliating element are not punishable as murder, but instead are punishable as voluntary manslaughter, and are characterized as being without "malice aforethought".

The punishment category of involuntary manslaughter encompasses those felonious homicides constituting manslaughter as defined by the common law. Such felonious homicides are spawned from conduct which does not embody either actual subjective intent to kill or an objectively characterized high death-producing potential. They are unintended killings which occur while doing some lawful act in a criminally negligent manner or while doing some unlawful act, not amounting to a felony, which is *malum in se* or *malum prohibitum*, but if the latter it must be at least the proximate cause of the homicide. See *State v. Conley*, 39 Me. 78, 87 (1854); *State v. Pond*, 125 Me. 453, 456, 134 A. 572 573 (1926); *State v. Hamilton*, 149 Me. 218, 239, 100 A.2d 234, 244 (1953); 40 Am. Jur. 2d, *Homicide*, § 70; and Anderson, *Wharton's Criminal Law & Procedure*, § 289 (1957). Felonious homicides found in the involuntary manslaughter punishment category present the least degree of blameworthiness for purposes of severity of punishment and quite obviously are described as being without "malice aforethought." The absence

of a specific subjective intention to kill or to commit an unlawful act which has a high objective tendency to produce death is the distinguishing feature between those felonious homicides punishable as involuntary manslaughter and those punishable as murder or voluntary manslaughter.

This careful separation of the punishment categories lays bare the fact that murder and voluntary manslaughter have a special interrelationship wherein involuntary manslaughter plays no part. This interrelationship arises because both murder and voluntary manslaughter are penalty categories which apply to the same kind of unlawful killing *i.e.* one which is intentional or is characterized by conduct which when objectively evaluated has a high death producing potential.[6]

Given this application of the single generic offense, the so-called "presumption of malice" is applied as follows:

The "presumption of malice" arises only where the State has proven beyond a reasonable doubt that the killing is *intentional* and *unlawful*, *State v. Rollins*, Me. 295 A.2d 914, 919, 920 (1972), or which is characterized by conduct which when objectively evaluated is deemed to have a high death producing potential and is *unlawful*.[7] Proof of such a killing beyond a reasonable doubt establishes felonious homicide punishable as murder as a matter of sound public policy. *State v. Wilbur*, Me., 278 A.2d 139, 145 (1971), (App. 89); *State v. Rollins*, Me., 295 A.2d 914, 920 (1972); *State v. Lafferty*, Me., 309 A.2d 647, 665 (concurring opinion at 671, 672) (1973). Therefore, it is the sole function of the "presumption of malice" to place upon a defendant the burden of reducing a *prima facie* case of felonious homicide punishable as murder,

[6]It is for this reason, that the instant case is only concerned with the method by which the jury selected the appropriate penalty category to fit the crime, murder or voluntary manslaughter.

[7]It is readily apparent that the "presumption of malice" cannot function at the level of a felonious homicide punishable as involuntary manslaughter because the requisite element of intentionality, or particular brutality, is absent.

proven beyond a reasonable doubt, to the lower punishment category of voluntary manslaughter by establishing by a preponderance of the evidence that though the unlawful killing remains intentional, or particularly brutal, it was the product of heat of passion on sudden provocation. Heat of passion on sudden provocation consists of a set of facts having nothing to do with the facts necessary to establish an unlawful homicide (*i.e.* not justified or excused) or the facts necessary to establish intentionality, or particular brutality. However, the facts which would establish heat of passion on sudden provocation may arise out of any evidence in the case, including the State's evidence

The Maine approach of viewing the law of felonious homicide as consisting of a single generic offense is not unique. It has been the apparent approach actually taken in Louisiana since 1942 (L.S.A. - R.S. 14:29 *et seq.*) and in the recent statutory revisions in New York in 1967 (N.Y. Penal Law §§125.00 *et seq.*)[8] (McKinney's Consolidated Laws of New York, c.40); Oregon in 1971 (ORS 163.005) and Pennsylvania in 1973 (Purdon's Pennsylvania Statutes Annotated, Title 18 §§2501 *et seq.*) It is also the approach taken in the Proposed Special Draft, A.L.I. Model Penal Code (Article 210 - July 30, 1962).

B

THE PLACING OF THE BURDEN OF PROOF ON A DEFENDANT TO MITIGATE A CRIME OF FELONIOUS HOMICIDE PUNISHABLE AS MURDER TO FELONIOUS HOMICIDE PUNISHABLE AS VOLUNTARY MANSLAUGHTER DOES NOT OFFEND TRADITIONAL NOTIONS OF JUSTICE

The language of this Court has repeatedly emphasized that its "judicial judgment in applying the Due Process Clause must

[8]New York Penal Law 125.25 (murder) makes intentional killings under the influence of "extreme emotional disturbance" an affirmative defense to murder.

move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment . . . An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review." *Leland v. Oregon*, 343 U.S. 790, 799 (1952) and see *Malinski v. New York*, 324 U.S. 401, 417 (1945) (concurring opinion of Frankfurter, J.). The test is whether or not the state practice "offends some principle of justice so rooted in the traditions and conscience of all people as to be ranked as fundamental." A procedure will not violate due process merely because another method may be deemed fairer or wiser than the one under consideration. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Leland v. Oregon*, *supra*, at 798, 799. This Court will not interfere with a state's policy with respect to burden of proof unless that policy violates some generally accepted concept of basic standards of justice. *Leland v. Oregon*, supra, at 799.

In the instant case it is clear that the Trial Justice charged the jury with reference to the law of felonious homicide as it has been outlined in this brief. The Trial Court Judge carefully instructed that there was a presumption of innocence (App. 19); that the State had to prove the whole case beyond a reasonable doubt (App. 20 - 22, 46); that the jury first had to find a homicide and if they did not the verdict would be not guilty, but if they did, the question would be is it murder or manslaughter (App. 22, 35, 56, 58, 59); that in making their determination as to the existence of a homicide, reasonable inferences of fact could be drawn (App. 23, 24); that the State must prove beyond a reasonable doubt, (1) death, (2) that the defendant killed, (3) an intentional killing, (4) an unlawful killing (App. 35 - 38); that the Defendant claimed to be guilty of only (voluntary) manslaughter (App. 39); that under certain circumstances malice may be presumed (App. 44 - 47); and finally, that the defendant did not have to take the stand or present witnesses, that the jury was to decide whether or not alleviating circumstances were present from any evidence in the case (App. 43, 44, 52). With particular

reference to the instruction on implied malice ("presumption of law") the trial judge repeatedly emphasized that guilt of an *intentional* and *unlawful* killing had to be established beyond a reasonable doubt and then the issue would become is it murder or is it (voluntary) manslaugher, the presence of absence of malice being the deciding factor on this second issue.

In the view of the Maine law, there is nothing fundamentally unfair about placing the burden on a defendant to mitigate the punishment within the context of a felonious homicide punishable as murder prosecution. Criminality is clearly established beyond a reasonable doubt by proof of an *intentional*, or particularly brutal, and *unlawful* killing, there being nothing in the factual proof necessary to establish heat of passion on sudden provocation which will negate in any fashion the defendant's legal guilt of an intentional felonious homicide.

As explained above, a so-called "presumption of malice" is not a presumption at all in the sense that anything factual is being inferred by the jury from other facts proved. Nor is the "presumption of malice" an affirmative defense, because such defenses go to the issue of legal accountability in the first instance. The "presumption of malice" is nothing more than a device by which the law will impose the most severe punishment upon defendants who are proven to have committed certain types of killings, *i.e. intentional*, or *particularly brutal*, and *unlawful* killings, unless they can convince the fact finder by a preponderance of the evidence that the severity of the penalty should be reduced.

This procedure has been dictated by a public policy evaluation that people who commit the types of killings above described should be punished most severely unless they can convince the fact finder that in spite of their *guilt* they deserve to be treated less severely because there are mitigating features to their *unlawful actions*. It is in short, nothing more than a public policy evaluation concerning the nature of punishment in relation to promoting safety and welfare. *State v. Rollins*, Me., 295 A.2d 914, 920 (1972).

To find that the procedure employed pursuant to the Maine "presumption of malice" violates due process without analyzing its true impact and operative effect would be to rule that due process is violated, not by the operation of a so-called "presumption of malice", but merely by the fact that for lack of a better term the State law chooses linguistically to designate this public policy by the term "presumption of malice".

C

THE FIRST CIRCUIT COURT OF APPEALS ERRED IN APPLYING THE STANDARDS OF *IN RE WINSHIP*, 397 U.S. 358 (1970) TO THE INSTANT CASE.

It is axiomatic that due process protects the accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute a crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). *Winship* points to the "vital role" which the requirement of proof beyond a reasonable doubt has played in our criminal procedure, providing concrete substance for the presumption of innocence and protecting important interests which the accused has at stake in a criminal prosecution, namely potential loss of liberty and the stigma which attaches to conviction. *In re Winship, supra*, at 363. However, *Winship* is wholly concerned with a situation where a determination of guilt is being made in the first instance, and does not address itself to due process requirements relative to penalty determination. It is for this reason that the Maine Supreme Judicial Court stated relative to the instant case, "We see no occasion to anticipate that *Winship* will be so extended as to reach the procedural requirements of *Conley* and *Knight* as now interpreted . . . ." *State v. Wilbur*, Me. 278 A.2d 139, 146 (1971) (App. 91). In its opinion of April 30, 1974, the First Circuit Court of Appeals after acceding to the Maine conceptualization of a single generic offense, went on to rule that the *Winship* requirement of proof beyond a reasonable doubt operates so as to prevent the State from imposing a burden of persuasion on a defendant to mitigate felonious homicide punishable as murder to felonious

homicide punishable as (voluntary) manslaughter. *Wilbur v. Mullaney*, 496 F.2d 1303, 1305 (1974). (App. to petition for certiorari, pages A-8, A-15, A-16.) This is in the view of the State of Maine an unwarranted extension of the *Winship* decision.

Maine law obviously recognizes and applies the fundamental rule that an accused is presumed innocent until that presumption is overcome by evidence of guilt beyond a reasonable doubt. *State v. Jewell*, Me., 285 A.2d 847, 849 (1972). This fundamental rule is recognized and applied within the theory of felonious homicide. As has been enunciated previously, the law of Maine demands that the State convince the fact finder beyond a reasonable doubt of felonious homicide punishable as murder by establishing an *intentional*, or particularly brutal, and *unlawful* killing beyond a reasonable doubt. The so-called "presumption of malice" then operates not to presume guilt or any fact necessary to a determination of guilt, but to place the burden on the defendant to convince the jury that the punishment for the criminal act proven should be reduced. Thus, full force and effect is given to the constitutional presumption of innocence and its accompanying requirement of proof beyond a reasonable doubt at the level of guilt determination.

The First Circuit Court of Appeals while apparently recognizing the above, went on to consider what it deemed to be the substantive effect of Maine's procedure. In so doing, the Court focused upon the potential stigma and loss of liberty which a criminal defendant faces during a criminal prosecution, concluding therefrom that the same potentials for harm exist in fact finding procedures relative to punishment determination as exist in fact finding procedures relative to guilt determination and that therefore the principles of *Winship* should apply to both. *Wilbur v. Mullaney*, 496 F.2d 1303, 1306, 1307 (1974). (App. to petition for certiorari pages A-12 through A-15). The Court citing *Barnes v. United States*, 412 U.S. 837 (1973), made it clear that it found constitutionally acceptable a procedure which would force a defendant to generate an issue

or allow the jury to draw inferences from the evidence in the absence of explanation, but rejected any procedure which placed a burden of persuasion on the defendant. *Wilbur v. Mullaney, supra,* 1307, (App. to petition for certiorari, pages A-15, A-16).

The above analysis of the First Circuit ignores the fact that the interests of the accused being protected in *In re Winship* was the stigma and potential loss of liberty resulting from a *criminal conviction.* It has been made clear in the Maine law that at the point in time where the burden is placed on a defendant to mitigate, criminality has attached and the defendant, whether he be found guilty of murder or (voluntary) manslaughter, will still be guilty of having committed an *intentional,* or particularly brutal, and *unlawful* homicide. *State v. Rollins,* Me., 295 A.2d 914, 919 (1972). In quantitative terms the stigma which attaches to the defendant must be said to arise primarily from the fact of conviction for an *intentional* and *unlawful* killing and not from the fortuitous presence or absence of the palliating factor of heat of passion on sudden provocation.

When the First Circuit directed itself to the problem of loss of liberty, its analysis suffered from the same defect as above. Liberty is lost by virtue of the *conviction* for an *intentional* or *unlawful* killing, not because of the presence or absence of heat of passion on sudden provocation, concededly, the maximum penalty for (voluntary) manslaughter is 20 years imprisonment, whereas the only penalty for murder is life imprisonment. However, this Court has seen fit to rule that the unfettered discretion which a sentencing body has to impose sentence, even in those situations involving life and death, is not curtailed by the due process clause since the issue involved is not guilt determination. See *Williams v. New York,* 337 U.S. 241 (1949) and *McGautha v. California,* 402 U.S. 183, 196 (1973). As it relates to the potential for loss of liberty the same considerations which control the outcome of *Williams* and *McGautha* are present in the instant case. After a finding of an *intentional,* or particularly brutal, and *unlawful* killing, the jury

is solely involved in making a penalty determination, already having resolved the question of guilt or innocence.

The First Circuit, in spite of its assertion that it has acceded to the concept of a single generic offense, has attempted to superimpose considerations that are involved with the fact finding process as it relates to a determination of guilt or innocence upon the fact finding process of penalty determination where completely different considerations of both policy and law obtain. No where is this more evident than in the First Circuit's citation of *Barnes v. United States*, 412 U.S. 837 (1973) as being indicative of the appropriate rule to be followed on the question of the burden of proof which may be placed on a defendant in a criminal case. *Barnes* represents the last in a series of cases of the character of *Tot v. United States*, 319 U.S. 363 (1943) and *Leary v. United States*, 395 U.S. 6 (1969), wherein this Court has considered the permissible use of factual presumptions (more properly called inferences) in a criminal case. In *Barnes* as well as in *Tot* and *Leary*, the jury were asked to infer one fact from another proven fact, the fact to be inferred bearing directly on an element of criminality or guilt, such as knowledge. Because of this fact, this Court has set forth careful guidelines as to when presumptions may be used and the evidentiary impact of them. For example, to "rebut" a presumption of the *Barnes, Tot* or *Leary* type the defendant must merely raise a reasonable doubt as to the existence of either the presumed or proven fact. This is precisely because the presumed fact bears directly upon the issue of guilt in the first instance.[9]

[9]In Maine pursuant to the concept of felonious homicide, the principle that different defenses may require different burdens of proof depending upon whether or not they relate to criminality is recognized. For example, in *State v. Millett*, Me., 273 A.2d 504 (1971), the Maine Court recently announced that self-defense could be raised by merely going forward and generating the issue, *i.e.* raising a reasonable doubt. This is because self-defense relates to the basic issue of guilt or innocence of an *unlawful* homicide in the first instance. See *State v. Wilbur*, Me., 278 A.2d 139, 144 n. 3 (1971). The same approach would be taken in Maine with reference to the alibi defense. See *State v. Jewell*, Me., 285 A.2d 847 (1972).

The First Circuit refused to limit the rationale of *Winship* to the context within which it was decided, that is, considerations of due process which bear upon making of a determination of guilt. Further, the First Circuit suggested by its citation of *Barnes* that under these circumstances the only burden of proof which may be placed upon a criminal defendant is the burden to go forward. In so doing, the First Circuit has found it necessary to apply the due process requirements of guilt determination on to an area of the law, *i.e.* penalty determination, where neither the holding nor the rationale of *Winship* or *Barnes* expressly or impliedly mandates such a result.

CONCLUSION

For the reasons stated it is respectfully submitted that Maine's use of the "presumption of malice" relative to felonious homicide is consistent with the Due Process Clause of the United States Constitution and that the judgment of the First Circuit Court of Appeals should be reversed.

Respectfully submitted,

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